

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**In Re: GRAHAM KERSTING,**

**Respondent,**

**v.**

**SUPERINTENDENT RON REPLOGE, MISSOURI STATE HIGHWAY PATROL,**

**Appellant.**

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DOCKET NUMBER WD78983

**Date: June 7, 2016**

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Appeal from:

Boone County Circuit Court

The Honorable Gary M. Oxenhandler, Judge

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Appellate Judges:

Division Four: Alok Ahuja, C.J., P.J., Mark D. Pfeiffer, J, and J. Dale Youngs, Sp. .

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Attorneys:

George A. Batek and Nancy A. McKerrow, Columbia, MO for respondent

Andrew J. Crane, Columbia for appellant

# **MISSOURI APPELLATE COURT OPINION SUMMARY**

## **COURT OF APPEALS -- WESTERN DISTRICT**

**In Re: GRAHAM KERSTING**

**Respondent,**

**v.**

**SUPERINTENDENT RON REPLOGE, MISSOURI STATE HIGHWAY PATROL,  
Appellant.**

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Before Division Four Judges: Alok Ahuja, C.J., P.J., Mark D. Pfeiffer, J, and J. Dale Youngs, Sp. J.

On March 24, 2004, Graham Kersting pled guilty in the Circuit Court of Boone County to unlawful use of a weapon and felonious restraint. The charges stemmed from an incident in which Kersting, then eighteen years old, drove a knife into a door behind which his fifteen-year-old brother was hiding. Kersting was intoxicated at the time. There was no allegation that Kersting's offense was sexual in nature.

Kersting was later advised that he had to register as a sexual offender, because he had been convicted of "felonious restraint when the victim was a child" within the meaning of § 589.400.1(2), RSMo.

Kersting filed a petition in the circuit court to have his name removed from the sexual offender registry. After conducting an evidentiary hearing, the circuit court ordered Kersting's removal. The court held that § 589.400.1(2)'s reference to "felonious restraint when the victim was a child" should be interpreted to mean a "child under the age of 14."

The State appeals.

**AFFIRMED.**

**Division Four holds:**

The word "child" is not defined for purposes of the sexual offender registration statute, § 589.400, RSMo, or for purposes of the felonious restraint statute, § 565.120, RSMo. Looking at the statutes in context, however, there are several strong indications that the legislature intended "child" to refer to a victim less than fourteen years old. For purposes of felonious restraint, a victim is presumed to be incapable of consenting to the restraint if they are less than

fourteen. The statutory section immediately preceding the felonious restraint statute – § 565.115, RSMo – defines the crime of “child kidnapping” as involving the removal or confinement of “a child under the age of fourteen.” Further, § 589.425.1, RSMo provides, in part, that “[f]ailing to register as a sex offender is a class D felony unless the person is required to register based on having committed . . . a felony involving a child under the age of fourteen, in which case it is a class C felony.” Moreover, several of the offenses for which registration is required appear in chapter 573 of the Revised Statutes, addressing pornography and related offenses. For purposes of chapter 573, “child” means “any person under the age of fourteen.” § 573.010(1), RSMo.

On the other hand, the State cites to other offenses listed in § 589.400.1, and to other Missouri statutes, which contemplate that a “child” may be *older* than fourteen. At best, however, the State’s arguments would prove nothing more than that the term “child” is ambiguous, because it is reasonably susceptible of different meanings. In the absence of any other means to resolve the ambiguity, we would be required to apply the rule of lenity, which requires that we construe ambiguities in penal statutes against the government, and in favor of persons subject to those statutes, such as Kersting. Therefore, even if we credited the State’s arguments and found the use of the word “child” in § 589.400.1(2) to be ambiguous, we would nonetheless read the word to refer to a person under age fourteen, since that is the reading most favorable to Kersting.

Because Kersting’s victim was fifteen years old, Kersting was *not* convicted of “felonious restraint when the victim was a child” under § 589.400.1(2), and the circuit court correctly held that he was not required to register as a sexual offender.

**Opinion by: Alok Ahuja, Chief Judge**

June 7, 2016

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